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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-223

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

BAPTIST HOSPITAL, INC.,

Respondent.

MOTION FOR LEAVE TO SUBMIT BRIEF AND AMICUS CURIAE BRIEF ON BEHALF OF THE NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO SUBMIT BRIEF
AS AMICUS CURIAE

To the Honorable, the Chief Justice and
The Associate Justices of the
United States Supreme Court

Pursuant to Rule 42(3) of the Rules of this Court, the National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO (hereinafter the "National Union") moves this Court for leave to file the accompanying brief as Amicus Curiae in support of the Petitioner. In support of the motion, the National Union shows as follows:

1. Nature of the Applicant's Interest

The National Union represents approximately 100,000 health care employees in over 350 health care institutions. This case is of vital concern to the Union and the members it represents as the right of employees in this industry to organize and to join and assist labor organizations will be directly affected by the outcome of this case.

The decision of this Court in this matter will, of course, have a profound impact on the rights of health care employees to solicit their fellow employees to join them in becoming members of Unions. If the decision of the Court below is upheld, Unions and employees in the health care industry will be deprived of rights that, for many, were only recently secured from Congress when the latter passed the 1974 Amendments to the Labor-Management Relations Act (hereinafter the "Act") which provided for the first time, coverage under the Act for employees employed by non-profit hospitals.

2. Amicus' Qualification

The National Union filed an amicus brief with the National Labor Relations Board (hereinafter the "Board") in St. John's Hospital and School of Nursing, Inc., 222 NLRB 1150 (1976), the case in which the Board established its current policy concerning solicitation and distribution rules in the health care industry. In addition, one of the Locals of the National

Union was the charging party before the Board in another case involving the right of health care employees to solicit and distribute Union literature. The Board's order in the latter case was enforced in pertinent part in Lutheran Hospital of Milwaukee, Inc. v. N.L.R.B., 564 F.2d 208 (CA 7 1977), cert. granted and case remanded, 98 S.Ct. 3118 (1978).

The National Union also submitted an amicus brief to this Court in Beth Israel Hospital v. N.L.R.B., 98 S.Ct. 2463 (1978), a case dealing with the same issue before the Court in this case.

3. The Need For The National Union As Amicus

The National Union has been in the forefront in attempting to organize employees in the health care field. It has been engaged in this task for over twenty years. It therefore possesses a unique background and experience which will be of unquestionable assistance to the Court in deciding the issues raised in this case.

4. Request For Consent To Submit

On February 1, 1979, the National Union requested the consent of the Petitioner and Respondent to submit a brief Amicus Curiae. The Solicitor General, on behalf of Petitioner National Labor Relations Board consented in a letter dated February 5, 1979 attached hereto. The attorneys for

the Respondent informed my office by telephone that they could not give such consent.

WHEREFORE, it is respectfully requested that the National Union be granted leave to file the accompanying brief Amicus Curiae in this case.

Dated:

New York, N.Y.
February 13, 1979

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Statement of the Case	1
ARGUMENT:	
THE COURT BELOW ERRED IN REFUSING TO ENFORCE THE ORDER OF THE BOARD WHICH FOUND THAT THE HOSPITAL VIOLATED SECTION 8(a)(1) OF THE ACT BY PROMULGATING A RULE WHICH PROHIBITED EMPLOYEES, DURING NON-WORKING TIME, FROM SOLICITING UNION SUPPORT IN ALL AREAS OF THE HOSPITAL TO WHICH PATIENTS AND VISITORS HAVE ACCESS	2
Conclusion	12
APPENDIX:	
Consent To Filing Amicus Curiae Brief	A-1

TABLE OF AUTHORITIES

Cases:

Baptist Hospital, Inc. 223 NLRB 344, 348, 349 (1976). . . .	4, 9
Baylor University Medical Center v. N.L.R.B., 578 F.2d 351 (CA D.C. 1978	9,10

	Page
Beth Israel Hospital v. N.L.R.B., 98 S.Ct. 2463 (1978)	4, 9,11
N.L.R.B. v. Magnavox Company, 415 U.S. 322 (1974)	2
N.L.R.B. v. National Jewish Hospital, __F.2d__, 99 LRRM 3141,3144 (CA 10 1978)	10
N.L.R.B. v. J. Weingarten, Inc. 420 U.S. 251, 266, 267 (1975)	6
Republic Aviation Corp. v. N.L.R.B, 324 U.S. 793 (1945)	2
Stoddard-Quirk Mfg. Co., 138 NLRB 615 (1962)	2
St. John's Hospital and School of Nursing, Inc., 222 NLRB 1150 (1976)	2 4,5
Statutes	
House Report, No. 93-1051	7
S. Report No. 93-766, 93rd Cong. 2d Sess., p. 3	8
120 Cong. Rec. 22574 (July 10, 1974)	8
120 Cong. Rec. 16900 (May 30, 1974)	8
120 Cong. Rec. 22578 (July 10, 1974)	8

	Page
120 Cong. Rec. 22579 (July 10, 1974)	8

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STATEMENT OF THE CASE

Amicus will not burden the Court with a restatement of the facts but rather, endorses the statement contained in petitioner's brief.

ARGUMENT

THE COURT BELOW ERRED IN REFUSING TO ENFORCE THE ORDER OF THE BOARD WHICH FOUND THAT THE HOSPITAL VIOLATED SECTION 8(a)(1) OF THE ACT BY PROMULGATING A RULE WHICH PROHIBITED EMPLOYEES, DURING NON-WORKING TIME, FROM SOLICITING UNION SUPPORT IN ALL AREAS OF THE HOSPITAL TO WHICH PATIENTS AND VISITORS HAVE ACCESS

The Board, with court approval, has long held that an Employer may not lawfully adopt a rule prohibiting employee solicitation of Union membership during non-working time or prevent distribution of Union literature during non-working time in non-working areas, absent special circumstances. Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 (1945); N.L.R.B. v. Magnavox Company, 415 U.S. 322 (1974); Stoddard-Quirk Mfg. Co., 138 NLRB 615 (1962).

Hospitals contended however that because of their unique status in providing services to the ill and infirm, the Board should adopt a special rule applicable to such institutions which would permit them to prohibit solicitation and distribution by employees on their non-work time in all areas to which the public and patients have access. The Board, in St. John's Hospital and School of Nursing, Inc., 222 NLRB 1150 (1976) held that since "the primary function of a hospital is patient care," a "tranquil atmosphere is essential

to the carrying out of that function." The Board concluded that a hospital may lawfully ban all employee solicitation, even during non-working time, in "strictly patient care areas" such as patient rooms, operating rooms and X-ray and therapy facilities.

However the Board rejected as too broad the position of the hospitals that all solicitation and distribution of Union literature should be banned in all areas to which patients and visitors have access including cafeterias, lounges, and the like. The Board held, on balance, that "the interests of patients well enough to frequent such areas do not outweigh those of the employees to discuss or solicit Union representation." 222 NLRB at 1151.

In the instant case, the Employer's no-solicitation/no-distribution rule prohibited employees from soliciting Union support or distributing Union literature in any area open to the public or in any area where work is performed. Pursuant to this rule neither solicitation nor distribution was permitted in the Employer's gift shop, the main cafeteria, lobbies, public rest rooms, entrances and sidewalks leading to the entrances, and a parking lot located across the street from the hospital. The only areas where employees could engage in solicitation under this rule were two employee lounges, the utility rooms and perhaps the nurses' stations. One of the lounges is located at some distance from the main patient care area where most of the employees work and is thus not readily accessible

to most employees on short breaks. The other lounge can only accommodate 25 to 30 employees and is utilized primarily by employees who work on the floor where it is located. Baptist Hospital, Inc., 223 NLRB 344, 348, 349 (1976).

Following its decision in the St. John's case, supra, the Board concluded that the rule violated Section 8(a)(1) as it prohibited solicitation during non-work time in areas of the hospital other than immediate patient care areas.

The United States Court of Appeals for the Sixth Circuit denied enforcement of the Board's order. 576 F.2d 107 (CA 6 1978). The Court concluded that the hospital had shown that special circumstances existed which justified its rule. These circumstances were that patients had access to the areas in which solicitation was prohibited and that the rule was necessary to prevent disruption of patient care. The decision of the Sixth Circuit predated the decision of this Court in Beth Israel Hospital v. N.L.R.B., 98 S.Ct. 2463 (1978).

In the Beth Israel case the Court decided that nothing in the legislative history of the 1974 Amendments to the Act indicated that Congress was not satisfied "to rely on the Board to continue to exercise the responsibility to strike the appropriate balance between the interests of hospital employees, patients and employers." 98 S.Ct. at 2471. The Court therefore upheld as proper:

> "The Board's general approach of requiring health care facilities to permit employees' solicitation and distribution during non-working time in non-working areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patients. . . ." Id. at 2477.

The Board in the St. John's case, supra, reached an accommodation between the competing rights and interests of the hospital employees and their employers. While the National Union would have preferred that the traditional rules of the Board with respect to solicitation and distribution of literature be applied equally to health care employees, the Board's decision reaching the accommodation was well within its discretion as:

> "[T]he Board has the 'special function of applying the general provisions of the Act to the complexities of industrial life.' NLRB v. Erie Resistor Corp., 373 U.S. 221, 236, 83 S.Ct. 1139, 1150, 10 L.Ed.2d 308 (1963); see Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798, 65 S.Ct. 982, 985, 89 L.Ed. 1372 (1945); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 196-197, 61 S.Ct. 845, 853-854, 85 L.Ed. 1271 (1941), and its special competence in this field is the justification for the deference accorded its determination.

> American Ship Building Co. v. NLRB, 380 U.S. at 316, 85 S.Ct., at 966. Reviewing courts are of course not 'to stand aside and rubber stamp' Board determinations that run contrary to the language or tenor of the Act, NLRB v. Brown, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965). But the Board's construction here, while it may not be required by the Act, is at least permissible under it, and insofar as the Board's application of that meaning engages in the 'difficult and delicate responsibility' of reconciling conflicting interests of labor and management, the balance struck by the Board is 'subject to limited judicial review.'" N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251, 266, 267 (1975).

The Hospital still insists, however, that the very fact that a health care facility is involved justifies its restrictive no-solicitation rule. It would place the burden upon the Board to prove that patient care will not be disrupted; failing that the validity of its rule would be sustained.

It is true of course that Congress recognized the special needs of health care institutions. Notice provisions dealing exclusively with such institutions were included in the Act to allow these institutions to prepare for labor disruptions. However the provisions added to

the Act which deal exclusively with health care institutions do not relate to rules pertaining to solicitation or distribution. To the contrary, they pertain solely to the need of such institutions to maintain continuous service to patients.

None of the unique provisions included in the 1974 Amendments by Congress even remotely deals with solicitation and distribution rules. Since Congress did not enact any limitations on employee solicitation rights in the health care industry, the Board was free to make the accommodation it reached in this case.

Moreover the Hospital completely ignores the fact that the major purpose of the amendments was to confer upon employees of non-profit health care institutions all of the rights guaranteed to other employees already covered by the Act. The House Report, No. 93-1051 stated with reference to the health care amendments:

> "The bill removes the existing Taft-Hartley exemption in section 2(2) of the Act. It restores to the employees of nonprofit hospitals the same rights and protections enjoyed by the employees of proprietary hospitals and most all other employees. Indeed, the Committee could find no reason why 1,427,012 employees of these nonprofit hospitals - representing 56% of all hospital employees - should continue to

be excluded." H. Rept., No. 93-1051, 93rd Cong. 2d Sess., p. 4.

See also, S. Rept., No. 93-766, 93rd Cong. 2d Sess., p. 3.

When the Senate was considering the conference report, Senator Williams discussed the principal purpose of the amendments in the following language:

> "During the course of the recent debates the principal purpose of the bill - the extension of collective bargaining rights, was never the subject of serious challenge or controversy. Hopefully this unanimity will be interpreted to to mean that employees of nonprofit hospitals will no longer have to maintain their status as second-class citizens in this area of labor relations." 120 Cong. Rec. 22574 (July 10, 1974, Remarks of Senator Williams).

See also, 120 Cong. Rec. 16900 (May 30, 1974, Remarks of Representative Ashbrook); 120 Cong. Rec. 22578 (July 10, 1974, Remarks of Senator Javits); 120 Cong. Rec. 22579 (July 10, 1974, Remarks of Senator Taft).

Clearly then, Congress' intention was to treat health care employees in the same manner as all other employees except where special provisions were enacted to ensure against interruptions of patient

care because of strikes or picketing. Congressional concern did not extend to solicitation and distribution rules. Indeed as noted by the Court in Beth Israel Hospital v. N.L.R.B., supra, Congress did not even prohibit strikes in this industry:

> ". . . Indeed, although Congress recognized that strikes could cause complete disruption of patient care and enacted provisions designed to forestall them, it apparently felt that extension of the right to strike was sufficiently important to fulfillment of its goals to permit strikes despite that result. If Congress was willing to countenance the total, albeit temporary, disruption of patient care caused by strikes in order to achieve harmonious employer-employee relations and long-term improved health care, we cannot say it necessarily regarded appropriately regulated solicitation and distribution in areas such as the cafeteria as undesirable without evidence of a substantial threat of harm to patients." 98 S.Ct. at 2473.

To sustain the Hospital's position would mean, in many cases, that all areas of a health care facility would be excluded from solicitation as patients could have access to all areas of the institution. Indeed this was the situation in Baylor University Medical Center v. N.L.R.B.,

578 F.2d 351 (CA D.C. 1978).*

The burden must remain on the employer "to bring forward positive evidence showing that solicitation activities had a disrupting effect upon patients' health." N.L.R.B. v. National Jewish Hospital, ___F.2d___, 99 LRRM 3141, 3144 (CA 10 1978). No such evidence was introduced in this case. The Hospital merely indicated that patients have access to most of the areas of the hospital. As stated above, if the mere presence of patients can prevent Union solicitation, the entire hospital would be rendered off limits to solicitation.

The argument that discussion of Union affairs will have a disrupting effect on patient care is belied by the experience of the National Union. Almost all of the collective bargaining agreements negotiated by the National Union or its affiliated districts contain a Union visitation clause which permits organizers and delegates reasonable access to the various departments of the hospital which employ members of the bargaining unit for the purpose of conferring on problems and grievances and to be of assistance in administering the contract. Despite the fact that access under these

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*Baylor employed over 3,700 individuals and has a bed capacity of 1,125. 578 F.2d at 355.

agreements is broader than the rule enunciated by the Board, no problems involving disruption of patient care have developed.

Another variant of the position espoused by employers in the health care industry is that a broad no-solicitation/no-distribution rule prohibiting such activity in all areas to which patients and visitors have access should be deemed presumptively valid. Only if an institution does not maintain employee only areas or if such areas are inadequate would employees be allowed to solicit and distribute in locations such as cafeterias, lounges, and gift shops where patients and visitors may be present.

This proposal, if adopted, would result in endless litigation to determine the adequacy of employee only areas. Moreover it distorts the purpose of the Act which is to protect employees in the exercise of their Section 7 rights. Activities such as solicitation for Union purposes must be deemed presumptively valid under Section 7 as this Court only recently reaffirmed in Beth Israel Hospital v. N.L.R.B., supra. The burden there was correctly placed upon the employer to establish that a more extensive ban is necessary to prevent disruption of patient care. The Hospital here has not met that burden.

It has not shown, for example, any irresponsible employee behavior or other conditions relating to employee solicitation

or distribution which establish that patient care would be disrupted. An employer is free to discipline employees who act in a disorderly or disruptive manner. It is thus not necessary to limit employee rights under Section 7 of the Act to prohibit such behavior.

CONCLUSION

For the above stated reasons, the order of the Court below denying enforcement of the order of the Board should be reversed.

Respectfully submitted,

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February 5, 1979

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Re: NLRB v. Baptist Hospital,
Inc. - No. 78-223

Dear Mr. Dorn:

As requested in your letter of February 1, 1979, I consent to the filing of an amicus curiae brief on behalf of the National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO.

Sincerely,

Wade H. McCree, Jr.
Solicitor General